increased incentives to extract the maximum financial benefits from a developing competitive market in telecommunications.[51]

As the Alliance explains, the 1996 Act significantly altered the relationship between MTE owners and telecommunications carriers.[52] Some MTE owners now expect to gain revenues from the increased demand for telecommunications services made possible and created, in part, by the 1996 Act.[53] The benefits of telecommunications competition are not infinite although, properly implemented, the Telecommunications Act of 1996 will permit consumers, telecommunications carriers, and MTE owners all to enjoy the benefits of a vibrant and competitive telecommunications market. However, some MTE owners, in seeking to secure *all* of the surplus benefits of competition, go beyond appropriating the surplus and begin to interfere with the ability to produce at optimal levels. The aggregate effects of this surplus extraction make society worse off and interfere with the optimal outputs that could otherwise be produced by fixed wireless and other telecommunications technologies. While the actions of these MTE owners will stifle the development of competition, the limited competition that is nonetheless able to develop will reap lesser benefits for consumers than would otherwise be available.

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51 See, e.g., Comments of Real Access Alliance at 25 (asserting that some landlords may attempt to lower rents by charging more for telecommunications access rights).

52 Comments of Real Access Alliance at 31 ("[I]n the traditional environment, the ILEC had just as much monopoly power over the property owner as it did over the telephone subscriber. The property owner needed its tenants to have service as much as the tenants needed the service. In the new competitive world, the relationship between telecommunications providers and property owners is completely different.")

53 See id.

The comments of some in the real estate industry assert that nondiscriminatory telecommunications carrier access to consumers in MTEs would operate as a subsidy from the real estate industry to the telecommunications industry.[54] To the contrary, nondiscriminatory access represents an effort to prevent windfalls to MTE owners that produce negative social effects. Unreasonable and excessive MTE owner rent extractions from telecommunications carriers will limit the dynamism of one of the principal mechanisms of our economy -- telecommunications. Moreover, outright access restrictions, unreasonable access conditions, and excessive access fees will limit consumer choice thereby disabling the proper functioning of a competitive market. Hence, contrary to some real estate industry assertions, nondiscriminatory access is a mechanism to ensure that no single interest group will disrupt the balance of a competitive marketplace. To the extent that non-discriminatory access results in greater tenant satisfaction, it reaps an added benefit for the MTE owner.

D. The Real Access Alliance Survey Is Inadequate.

Assuming *arguendo*, that the Real Access Alliance survey ("RAA Survey") is deemed to be sound -- which it is not (as explained below) -- it presents some very troubling statistics. For example, lengthy negotiation delays can and often do mean lost customers. Competition delayed is competition denied. According to the RAA Survey, approximately one out of every five respondents had been involved in MTE access negotiations lasting over a year.[55] This excessively

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54 See, e.g., Comments of Cornerstone Properties et al. at 36; Real Access Alliance at 29; Real Access Alliance Economic Analysis at 23. This position is odd given that telecommunications carrier access to MTEs (and the improvement of MTE telecommunications networks) will enhance the value of MTEs. Any subsidies created by a nondiscriminatory MTE requirement flow to MTE owners from the value enhancement of their property (as well as to consumers).

55 See Survey attached to the Comments of the Real Access Alliance at 8.

long negotiation period precedes a lease and eventual facility installation.[56] It is unrealistic to expect a customer to wait for the CLEC it was interested in taking service from for this lengthy period of time, particularly given that the ILEC can take advantage of these access delays by signing the customer immediately to a new plan. CLECs cannot compete fairly operating under such extreme disadvantages. Moreover, it is obvious that many consumers are denied competitive choice when the market would, but for this flaw, make it available to them.[57] The Commission can and should declare that it is patently unreasonable and anticompetitive for MTE owners to drag out access negotiations for longer than 30 to 45 days from the date of a customer request for service. Teligent has found, unfortunately, that most negotiations take substantially longer to conclude. The RAA statistics suggest that the plight of the CLECs is a significant competitive barrier redounding to the overwhelming benefit of the incumbents.

Moreover, 44 percent of respondents did or may have denied telecommunications carrier access *entirely*.[58] The survey does not eliminate the possibility that a significant portion of the remaining 56 percent of respondents may have permitted telecommunications carrier access, but only pursuant to unreasonable rates, terms, and conditions.

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56 One CLEC explained that it is not uncommon for its staff to wait as long as four to six months to begin access negotiations. See Comments of NEXTLINK at 40.

57 The Chairman has expressed an understanding of the principle that Commission intervention is warranted where the market is not working to serve the needs of consumers. See Remarks of William E. Kennard, Chairman, Federal Communications Commission at the National Association of Telecommunications Officers and Advisors 19th Annual Conference (Sep. 17, 1999)("You need regulation when market-based incentives are not aligned with the needs of consumers.").

58 See Survey attached to the Comments of the Real Access Alliance at 5.

Nevertheless, the RAA Survey purportedly submitted to represent the collective position of the real estate interests, lacks a sufficiently sound response rate to justify reliance on it for Commission action. Only five percent of Alliance members responded to the survey. Presumably, there are MTE owners that are *not* members of the Real Access Alliance. Hence, the number of U.S. MTE owners represented by the survey is actually *less than* five percent. The fact that only five percent of Alliance members took the time to respond to the survey (with its alarmist introduction)[59] should inform the Commission that the real estate industry -- as opposed to its trade associations -- is not unduly concerned or alarmed by the prospect of nondiscriminatory telecommunications carrier access to MTEs. Moreover, the opinions of 95 percent of the Alliance's members are not even represented in the survey.[60] Due to the five percent response rate, the RAA Survey can hardly be considered representative of the Alliance members generally.

In addition to the poor response rate of the survey, the survey results themselves are distorted by the RAA written comments. For example, the Alliance devotes pages of its comments detailing the building security calamities that it alleges are sure to occur in the event of nondiscriminatory telecommunications carrier access requirements.[61] Yet, only 2 percent of survey respondents (that is, only 2 percent of the mere 5 percent of Alliance members that responded) listed building security as their primary cost or inconvenience associated with

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59 The survey's introduction was not neutral and unacceptably skewed responses to the survey in opposition to nondiscriminatory access.

60 The lack of cooperation with the survey by 95 percent of RAA members may also have been a function of the self-selective nature of the survey. RAA members that have been uncooperative or unreasonable with CLECs may have declined to respond to the RAA Survey for that reason.

61 Comments of Real Access Alliance at 61-65.

installing a new wireless competitive communications provider.[62] This hardly supports the premise that this is the primary issue troubling the real estate industry in contemplating nondiscriminatory access. However, the alarmist Alliance comments fail to assign the proper place to this issue within the debate.

Teligent has repeatedly demonstrated its steadfast commitment to the preservation of MTE security, as have other CLECs.[63] Indeed, given that the Commission's rules require *all* LECs to comply with relevant wiring and safety codes, telecommunications carriers will continue to be required to comply with NSC and NESC requirements (as well as local fire codes and safety requirements) pursuant to any rules adopted in this proceeding. Finally, because the integrity of their networks and transmission capabilities are at stake in unsafe or hazardous environments, CLECs have incentives, aside from MTE owners' concerns, to ensure that safety and security measures are adequate and failsafe.

E. The Commission's Decisions Must Be Premised Upon A Correct Understanding Of The Legislative And Judicial Actions Surrounding Nondiscriminatory MTE Access.

1. The Absence Of Federal Legislation Has No Substantive Meaning.

The real estate industry mischaracterizes the legislative and judicial actions related to nondiscriminatory telecommunications carrier access to MTEs. It is important that the Commission base its decision in this rulemaking on a proper reading of the relevant law. For example, the real estate industry claims that Congress contemplated a mandatory MTE access

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62 See Survey attached to Real Access Alliance Comments at 11.

63 See Comments of Teligent at 16-17; Sprint at 12.

statute for cable operators and ultimately decided against it.[64] The real estate industry uses this as support for the position that had Congress intended to provide a federal nondiscriminatory right of access for telecommunications carriers to MTEs, it would have provided for it more explicitly.[65]

The absence of more explicit access legislation cannot properly be used as a basis for such a proposition.[66] To the contrary, it is equally plausible if not more so that Congress saw no need to enact expensive mandatory access legislation because Section 224 and other provisions of the Communications Act already accomplished that goal.[67] Nevertheless, the congressional decision not to pursue mandatory access for cable operators via a statutory vehicle separate from Section 224 over a decade ago likely was premised upon a variety of factors -- including the different

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64 See Comments of Real Access Alliance at 41-42 (discussing the legislative history of Section 621(a)(2) of the 1984 Cable Act).

65 Id.

66 The Supreme Court has expressed a strong reluctance to draw inferences from Congress' failure to enact legislation granting an agency specific authority. See Schneidewind v. ANR Pipeline Co., 485 U.S. 293, 306 (1988), citing American Trucking Ass'n, Inc. v. Atkinson T. & S.F.R. Co., 387 U.S. 397, 416-18 (1967); Red Lion Broadcasting Co. v. F.C.C., 395 U.S. 367, 381, n.11 (1969).

67 Rep. Pickering recently informed Chairman Kennard that the Commission already had sufficient authority to implement a nondiscriminatory MTE access requirement. See Letter from Hon. Chip Pickering, House of Representatives, Congress of the United States, to the Hon. William E. Kennard at 1 (Aug. 5, 1999)("To the extent that occupants of multi-tenant buildings are restricted in their access to radio or wire communications from their carrier of choice due to a landlord's control over transmission facilities within a building, the FCC already has jurisdiction to remedy the problem."); see id. at 2 ("[T]he agency already possesses the tools to resolve the building access issue so that commercial and residential occupants of multi-tenant buildings nationwide can enjoy the benefits of telecommunications competition. I would encourage the FCC to use that authority . . .").

policy objectives of cable access and telecommunications carrier access -- and the absence of more explicit legislation itself cannot be assigned the force of law.

Moreover, it is entirely possible that many years before the 1996 Act, the barrier to telecommunications competition (a nascent concept, itself) presented by MTE access restrictions did not possess the severe ramifications that it does today. Teligent has explained to the Commission that, until recently, unreasonable restrictions on MTE access have not received a good deal of attention from the biggest players in the telecommunications industry because in the early years of competitive development, most telecommunications entry strategies by large companies were premised upon a UNE or resale model. As these models are proving uneconomic in the long term, leaders in the telecommunications industry are beginning to pursue facilities-based entry strategies.[68] Unreasonable MTE access restrictions represent a chief barrier to the success of facilities-based entry strategies.

2. The Commission Should Not Rely Upon Congress To Manage The Telecommunications Industry.

As unreasonable MTE access restrictions have multiplied, Congress may well believe that the Commission retains sufficient statutory tools to remedy the problem. Indeed, it is important to remember that Congress should not be relied upon to manage the phenomena affecting the telecommunications marketplace. This role is appropriately delegated to the Commission.[69]

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68 See Comments of Teligent at 6-7.

69 See, e.g., F.C.C. v. Pottsville Broadcasting Co., 309 U.S. 134, 138 (1940)("Underlying the whole law is recognition of the rapidly fluctuating factors characteristic of the evolution of broadcasting and of the corresponding requirement that the administrative process possess sufficient flexibility to adjust itself to these factors."); see also National Broadcasting Co. v. U.S., 319 U.S. 190, 218-219 (1943)("True enough, the Act does not explicitly say that the Commission shall have power to deal with network practices found inimical to the public interest. But Congress was acting in a field of regulation which was

Where, as in this instance, the Commission's existing authority permits it to eliminate a barrier to telecommunications competition, it does not need to -- in fact, should not -- await the enactment of more explicit federal legislation before it acts.

3. The Sections Of The Cable Act Relied Upon By The Real Estate Industry Are Wholly Irrelevant To The Nondiscriminatory Access At Issue In This Rulemaking.

Some in the real estate industry also point to a line of cases interpreting a Cable Act provision as support for the notion that nondiscriminatory MTE access has been deemed unconstitutional.[70] Their severely flawed analysis is misleading. The cases cited concern the application of a specific statutory provision -- not the concept of access itself -- with a policy foundation different from the nondiscriminatory access considered in this docket. Indeed, the cases restrict themselves to interpretation of the specific wording in that statutory provision and do not address the constitutional inquiry.[71] The statutory wording actually is wholly inapplicable

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both new and dynamic. . . . the Act gave the Commission not niggardly but expansive powers."); see also Philadelphia Television Broadcasting Co. v. F.C.C., 359 F.2d 282, 284 (D.C. Cir. 1966)("Congress in passing the Communications Act in 1934 could not, of course, anticipate the variety and nature of methods of communication by wire or radio that would come into existence in the decades to come. In such a situation, the expert agency entrusted with administration of a dynamic industry is entitled to latitude in coping with new developments in that industry").

70 See Comments of Real Access Alliance at 42. The statutory provision to which the Alliance cites -- Section 621(a)(2) reads: "Any franchise shall be construed to authorize the construction of a cable system over public rights-of-way, and through easements, which is within the area to be served by the cable system and which have been dedicated for compatible uses . . . ." 47 U.S.C. 541(a)(2)(emphasis added).

71 See Cable Holdings of Georgia v. McNeil Real Estate, 953 F.2d 600, 605 (11th Cir. 1992), cert. denied, 506 U.S. 862 (1992); Media General Cable of Fairfax v. Sequoyah Condominium Council of Co-Owners, 991 F.2d 1169, 1174 (4th Cir. 1993).

to the nondiscriminatory access requirements contemplated by the Notice.[72] Consequently, the cases relied upon by the real estate industry have no bearing upon the issues confronting the Commission in this docket.

F. The Commission Should Prohibit Exclusive Access Arrangements.

Almost all commenting parties are opposed to exclusive access arrangements.[73] Even real estate interests admit that exclusive access arrangements disserve consumers in MTEs.[74] Given the nearly unanimous disapproval of exclusive access arrangements and the Commission's clear authority to regulate such arrangements, the Commission should prohibit exclusive access arrangements between telecommunications carriers and MTE owners.[75] Specifically, on a going

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72 By its terms, the application of Section 621(a)(2) is limited to *public* rights-of-way and *dedicated easements* (that is, easements legally and expressly dedicated by the building owner to general utility use).

73 Comments of AT&T at 20-21; Bell Atlantic at 5-6; Central Texas Communications Inc. at 5; Competitive Policy Institute at 17-18; Competitive Telecommunications Association at 13; Ensemble Communications at 6; Global Crossing at 3-5; GTE at 16; Level 3 Communications at 6; Metromedia Fiber Network Services at 5; Personal Communications Industry Association at 11; RCN at 17-18; SBC at 7; SpectraPoint Wireless at 6; Sprint at 12; Wireless Communications Association International at 30-31.

74 See Comments of Cornerstone Properties at 33 ("In general, broadly written exclusive contracts are not desirable . . . we recognize that exclusive TSP agreements may inhibit tenant choice of services and TSPs."); Community Association Institute at 33 ("[T]here are certainly occasions where incumbent monopolistic cable companies have leveraged their position as the single source of telecommunications services to force community associations and their residents into unfavorable or exclusive contracts . . . .").

75 As the Wireless Communications Association International explains, Section 21.902(b) of the Commission's rules bars any licensee from entering into any lease with a building owner that prevents another licensee from entering into a lease with the same building owner for operation of its own facilities. See Comments of Wireless Communications Association International at 31. This anti-exclusivity rule ensures that radio licensees are permitted to operate within their licensed territories without exclusive agreements of other licensees prohibiting such operation. An anti-exclusive access rule in the MTE access context would be derived from the same underlying principle.

forward basis, the Commission should prohibit any carrier subject to Part 61 of the Commission's rules (even if the Commission has forborne from applying Part 61 rules) or otherwise subject to the Commission's jurisdiction, from entering into an exclusive access arrangement with an MTE owner.[76]

Some CLECs urge the Commission to allow exclusive access agreements, claiming that such arrangements permit carriers to serve MTEs that otherwise would go unserved or to recoup the costs associated with investment in the MTE.[77] The Commission should not promote CLEC entry plans whose viability relies upon the creation of monopoly environments through exclusive access arrangements. This policy would *not* promote competition -- indeed, it would do the opposite -- and it would lessen consumer welfare by prohibiting the marketplace from increasing choice, improving service, and lowering rates. Moreover, it flouts the principle of consumer choice. It prevents consumers from making the choice best suited to their differing needs, instead allowing a landlord to make a one-size-fits-all decision to further the landlord's own perceived interests.

GTE asserts that "[n]ew entrant telecommunications carriers have been signing exclusive contracts at enormous rates, locking up entire buildings and sealing off further competitive

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76 The Commission's authority to adopt rules in promotion of the Act's objectives was recently confirmed by the Supreme Court. See AT&T Corp. v. Iowa Utils. Bd., 119 S.Ct. 721, 730, 733 (1999).

77 See, e.g., Comments of First Regional Telecom at 6-7; OpTel at 14-15 (explaining that "exclusive arrangements help to justify and finance the significant investment required in network facilities needed to provide service to residents"). It should be noted that Teligent and many other facilities-based CLECs are able to and willingly do accept the risk of investing in network facilities to provide service to consumers in MTEs.

inroads that could by made by other carriers."[78] It goes so far as to erroneously cite to Teligent *customer service* term agreements as support for this proposition. Teligent does not enter into exclusive access arrangements with MTE owners or managers despite the offering of such arrangements by MTE owners and managers. Teligent has made it clear to its site acquisition representatives that they cannot enter into exclusive access arrangements with MTE owners or managers.

Of course, consistent with industry practice, Teligent *does* offer price reductions and other benefits to *end users* who agree to use Teligent's telecommunications services exclusively for a period of time.[79] This is the customer service contract to which GTE refers. These arrangements by a new entrant like Teligent do not restrict telecommunications carrier access to MTEs and, indeed, are not even agreements with the MTE owner (except, of course, where the MTE owner happens to be a Teligent end user and is entering an agreement with Teligent for its own business-related telecommunications services). They represent the exercise of consumer choice in telecommunications carriers. GTE's citation to such contracts as support for the exclusive access practices of other telecommunications carriers is a disingenuous attempt to mislead the

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78 GTE Comments at 17. Teligent acknowledges that there are CLECs entering into such exclusive access agreements. Indeed, Teligent has been denied access to MTEs because of another CLEC's exclusive access arrangements.

79 Consistent with the practices of many carriers in the telecommunications industry, Teligent has sometimes entered into "preferred provider" marketing agreements with MTE owners. However, these agreements do not and are not intended to impose access restrictions -- either in theory or in practice -- on other telecommunications carriers. So long as telecommunications carriers obtain nondiscriminatory access to consumers in MTEs, MTE owners should remain free to endorse or otherwise market to tenants one or more competing services.

Commission regarding this very important issue. Teligent has long opposed exclusive MTE access arrangements.

IV. A NONDISCRIMINATORY MTE ACCESS REQUIREMENT WOULD NOT AMOUNT TO A TAKING AND IS CONSTITUTIONALLY SOUND.

Teligent and other commenters explained to the Commission that an MTE access requirement premised upon a nondiscrimination obligation is not appropriately analyzed pursuant to the *per se* taking analysis of *Loretto*.[80] Instead, given the analysis in *Yee*, *Florida Power*, and the *Heart of Atlanta Motel* line of cases, it is clear that an inquiry into whether a nondiscriminatory regulatory obligation constitutes a taking should be pursued under the analysis used in *Penn Central*. Application of this analysis yields the conclusion that a nondiscriminatory MTE access requirement would *not* amount to a taking of private property.[81]

Nevertheless, some commenters claim that the *Penn Central* analysis and the *Heart of Atlanta Motel* line of cases are inapplicable.[82] They fail to understand that the result of physical occupation of a property owner's premises does not automatically trigger a *per se* analysis. Indeed, *Yee*, *Florida Power*, *Heart of Atlanta Motel* and a host of other similar cases all involved physical occupation by persons on the premises of another. The analysis is more sophisticated than some utilities and real estate industry commenters would have the Commission believe and

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80 See Comments of Teligent at 57; Association for Local Telecommunications Services at 21-22; AT&T at 43; Sprint at 19.

81 See Comments of Teligent at 59-60.

82 Comments of Real Access Alliance at 37-39.

the notion that they assert -- that interference with the right to exclude is a *per se* taking -- is simply wrong.[83]

Other commenters assert that the *per se* takings analysis applies because nondiscriminatory MTE access requires an MTE owner to do more than simply permit nondiscriminatory access to space already set aside for utility use.[84] These commenters assert that the requirement that an MTE owner permit occupation of space not already set aside for telecommunications carrier use would operate as an initial physical occupation and thus implicate the *Loretto* analysis.

A nondiscrimination requirement that persons be given access to facilities not otherwise set aside for use by the public does not amount to a *per se* taking. Indeed, the Americans with Disabilities Act requires MTE owners across the country to modify their structures -- and permit use of space not already set aside for this purpose -- so that persons with disabilities would be able to have access to MTEs.[85] No federal court has ever found such a requirement to amount to a taking. Indeed, one property owner challenged the constitutionality of the ADA on this basis, claiming that the remodeling required under the statute would result in the loss of as many as 20 seating places in his restaurant. The court expressly concluded under this set of facts that "the ADA merely proscribes the use of part of his own property and it therefore could be likened to a zoning regulation. Since the ADA merely regulates the use of property and does not give anyone

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83 See, e.g., Thomas v. Anchorage Equal Rights Comm'n, 165 F.3d 692, 708 (9th Cir. 1999).

84 See Comments of the National Association of Counties et al. at 10-11.

85 See 42 U.S.C. § 12101, *et seq.*

physical occupation of [the restaurant owner's] property, it is not within the Supreme Court's first [*per se*] category of takings."[86]

This scenario is highly analogous to the nondiscriminatory MTE access requirement at issue in the instant rulemaking. The technologies that are used to transmit and provide telecommunications are more varied than they were even a decade ago. Even if ILECs do not always use rooftops to transmit telecommunications, the failure to provide access to such spaces would operate as discrimination against newer, more efficient providers. As an analogy, restroom sizes and doorway widths historically may have been too small to accommodate wheel chairs. The expansion of restroom and doorway entrance facilities (and the concomitant reduction in other space) is not a taking but simply the reasonable accommodation necessary to accomplish socially beneficial nondiscriminatory objectives. The same rationale applies to the new technologies employed by CLECs.

Other commenters claim that permitting access to the ILEC does not sufficiently open the property to the public such that the government has a valid interest in requiring nondiscriminatory access to others.[87] The fact is, though, that until very recently, one entity -- the ILEC -- constituted the entirety of the local telecommunications industry. The fact that industry participants have multiplied is irrelevant to the application of nondiscrimination protections -- indeed, the need for such protections is enhanced particularly where discrimination persists. Where MTE owners have opened their properties to outside providers of telecommunications

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86 Pinnock v. Int'l House of Pancakes Franchisee, 844 F.Supp. 574, 587 (S.D.Cal. 1993).

87 See, e.g., Comments of National Association of Counties et al. at 10-11; Real Access Alliance at 38.

services, they should be required to provide nondiscriminatory access to *all* providers of telecommunications services to their tenants.[88]

Variants of this argument suggest that the MTE owner had no choice but to permit ILEC access to the MTE given its historical monopolist position.[89] Had additional telecommunications providers existed, the argument goes, the MTE owner could have placed conditions on and charged fees for access. These commenters argue that it is unfair now to require the residual benefits of the monopolist's power to extend to new entrants. This position ignores the underlying goal of the Telecommunications Act of 1996 -- to introduce competition and dismantle monopoly control over local telecommunications networks for the benefit of consumers. Throughout the Act, it is evident that in order to facilitate the development of competition, Congress sought precisely to make available to all telecommunications carriers the benefits that the ILEC had obtained by virtue of its monopoly. Section 224 provides nondiscriminatory telecommunications carrier access to the ILEC's (indeed, to *all* utilities') poles, ducts, conduits, and rights-of-way.[90] The unbundling requirements of Section 251(c)(3) provide CLEC access to portions of the ILEC network that were constructed and operated by virtue of being a monopoly provider -- including the ILEC's intra-MTE facilities.[91] Section 253 prohibits States and local

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88 Of course, where MTE owners provide their tenants with telecommunications services themselves (rather than permitting outside telecommunications carriers to provide such services), it would be more appropriate for the Commission to contemplate the imposition of not only nondiscriminatory access requirements, but also the more varied obligations required of local exchange carriers generally.

89 See Comments of Real Access Alliance at 39.

90 47 U.S.C. § 224(f)(1).

91 47 U.S.C. § 251(c)(3); see also "FCC Promotes Local Telecommunications Competition; Adopts Rules on Unbundling of Network Elements," CC Docket No. 96-98 *Public Notice*

governments from perpetuating the monopolist's favored position at the expense of competitive entry.[92] An MTE access requirement premised upon a nondiscriminatory obligation would accomplish similar goals through similar means.[93]

Application of the *Penn Central* test demonstrates that a nondiscriminatory MTE access requirement would not amount to a regulatory taking. Several commenters claim that a nondiscriminatory MTE access requirement would harm the MTE owners' investment-backed expectations and, consequently, would qualify as a regulatory taking.[94] It is important to note that the effect of regulatory action on a property owner's investment-backed expectations is only one prong of the *Penn Central* analysis and, standing alone, is not conclusive evidence of a regulatory taking.[95] Nevertheless, it is far from clear that MTE owners possess investment-backed expectations for telecommunications carrier access to their property. According to the RAA Survey, only 9 percent of respondents (that is, 9 percent of the mere 5 percent of RAA

(rel. Sep. 15, 1999)(summarizing *Third Report and Order and Fourth Notice of Proposed Rulemaking*)("*UNE Remand Public Notice*").

92 47 U.S.C. § 253(a).

93 Moreover, the assertion that the MTE owners *had* to open their properties to outside telecommunications providers is contradicted by the real estate industry comments which provide numerous examples of MTE-owner installed and operated MTE telecommunications systems. See, e.g., Comments of Real Access Alliance at 9, 18, 22; Allied Riser Communications Corp. at 2.

94 See, e.g., Comments of Arden Realty at 7; Real Access Alliance at 42, 58.

95 See Penn Central Transportation Co. v. New York City, 438 U.S. 104, 130-131 (1978) (finding that the "takings" analysis does not divide property rights and attempt to determine whether each has separately been violated, but rather focuses on "both the character of the action and the nature and extent of the interference with the [property] rights . . . as a whole." The effect on an owner's investment-backed expectations are but one part of the takings analysis.).

members that responded to the survey) mentioned revenue as their primary motivation for permitting telecommunications carrier access to their MTEs.[96] This suggests that investment-backed expectations for telecommunications carrier access to MTEs, if they do exist, are not widely held in the real estate industry.[97]

Even if investment-backed expectations were widely held, a nondiscriminatory MTE access requirement would not deny a return on an MTE owner's investment in telecommunications carrier access. A nondiscriminatory access requirement allows the MTE owner to charge telecommunications carriers a reasonable access fee. It would follow, then, that the more carriers that are permitted entry into an MTE, the more the MTE owner will realize any "investment-backed" expectations for access fee revenues. Indeed, only *unreasonable* access fees would be prohibited. Unreasonable expectations on investment returns are not preserved under the *Penn Central* analysis.[98] Moreover, the enhanced value of the MTE resulting from the presence of multiple telecommunications carriers will more than offset any reduction in access fees that MTE owners could collect under a nondiscriminatory regime; some MTE owners just choose to ignore this fact.

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96 See Survey attached to Comments of Real Access Alliance at 15.

97 In fact, MTE owners cannot reasonably assert that they possessed investment-backed expectations for telecommunications carrier access to MTEs constructed prior to the enactment of the Telecommunications Act of 1996.

98 Penn Central Transportation Co., 438 U.S. at 136 (explaining that the New York City law at issue permitted a "reasonable return" on Penn Central's investment).

V. THE COMMISSION'S JURISDICTION TO ACCOMPLISH NONDISCRIMINATORY MTE ACCESS IS NOT CREDIBLY DISPUTED BY THE COMMENTS.

Teligent and many other commenters provide several bases of Commission authority to require MTE owners to permit nondiscriminatory telecommunications carrier access to consumers in MTEs.[99] However, several commenters claim that the Commission lacks authority to require nondiscriminatory MTE access.[100] They go so far as to suggest that the Commission itself has already decided it lacks the requisite authority.[101] The separate statements of the Commissioners cannot be viewed as final opinions on matters that had not yet been commented upon and presented by interested parties to the Commission for its consideration.[102] Indeed, Commissioners consider the record before them and that record is still being developed.

The Commission retains jurisdiction over persons engaged in interstate wire communication.[103] By their own admission, MTE owners are persons engaged in wire communication.[104] In some instances, MTE owners actively operate telecommunications systems

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99 See Comments of Teligent at 23-53; Association for Local Telecommunications Services at 20-22; Bell Atlantic at 4; Competitive Telecommunications Association at 6; Personal Communications Industry Association at 18-19; Sprint at 16-17.

100 See, e.g., Comments of Cornerstone Properties et al. at 5-6, 11; Real Access Alliance at 34-37.

101 See, e.g., Comments of USTA at 7.

102 5 U.S.C. 553(c)(APA requirement that agency consider comments filed by the public).

103 47 U.S.C. § 152(a).

104 See, e.g., Constitutional Analysis attached to the Comments of Real Access Alliance at 35 ("Building owners now often seek to provide a comprehensive bundle of services to their 'customers,' including, at least in some instances, the provision of telecommunications services"); Real Access Alliance at 9, 18, 22.

and provide telecommunications services to their tenants.[105] In other situations, MTE owners own or control the telecommunications facilities over which telecommunications signals are transmitted.[106] Still, in others, MTE owners control the only portion of the telecommunications distribution network that *cannot* be duplicated without the MTE owner's acquiescence (unless, of course, the utility owns or controls conduits or rights-of-way within the MTE that CLECs can use to construct facilities to end users within the MTE). This role alone is sufficient to bring MTE owners within the subject matter and *in personam* jurisdiction of the Commission.[107] Indeed, if the Commission fails to take action mandating nondiscriminatory access to MTEs, a situation may develop whereby *no* carriers -- neither CLECs nor ILECs -- are able to gain access to MTEs as MTE owners construct their own facilities and serve their tenants (and refuse them access to competitive carriers) outside the regulation of the Commission.

Some commenters claim that the Commission cannot exert authority over MTE owners simply because their actions may have an incidental effect on telecommunications.[108] However, the MTE owners' affect on telecommunications is not merely incidental if they are denying, delaying, discriminating in the terms of access, providing service themselves, or being paid on the basis of telecommunications revenues. Even where the MTE owner does not actively provide

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105 Id. at 18, 22. Indeed, MTE owners actively operating intra-MTE telecommunications networks may qualify as local exchange carriers or, at a minimum, as telecommunications carriers as defined in the Communications Act.

106 Id.

107 See Comments of Teligent at 48-50 for a more extensive analysis of this position.

108 See, e.g., Comments of National Association of Counties et al at 6; Real Access Alliance at 34.

telecommunications services to its tenants, the MTE owner is in a unique position of being able to restrict or deny access or raise the costs of serving a customer because it may control the one portion of the telecommunications network that cannot be duplicated absent MTE owner permission. For example, the MTE owners can significantly raise the cost of CLEC entry to the point that competitive options are eliminated within the MTE. In addition, some MTE owners themselves admit to doing what the Commission itself -- with its wealth of communications experience -- refuses to do: analyze each company and determine which is most suitable for consumers, rather than permitting consumers to make these decisions themselves.[109] Moreover, the comments indicate that not only are MTE owners discriminating against CLECs vis-a-vis ILECs, but also that MTE owners are discriminating on the basis of technology used by the telecommunications carrier.[110] The nationwide aggregate effect of this behavior on telecommunications competition and the development of new technologies is far from incidental. The Commission should not condone such results by a refusal to intervene. The Commission could choose to exercise its jurisdiction over an MTE owner only when an MTE owner blocks or threatens to block or otherwise seeks unreasonable compensation for telecommunications carrier access to a consumer in the MTE.

The comments further demonstrate that *Bell Atlantic v. FCC* is inapplicable to the nondiscriminatory MTE access requirement being considered in this docket.[111] It should be

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109 See, e.g., Comments of Cornerstone Properties et al. at 5.

110 See, e.g., Economic Analysis attached to Real Access Alliance Comments at 17-18.

111 See, e.g., Comments of Personal Communications Industry Association at 21; WinStar at 43-45.

reiterated that no court has followed *Bell Atlantic* for the proposition asserted by the real estate industry. Indeed, although the real estate industry claims that courts have long held that the premise underlying *Bell Atlantic* limits agency action,[112] their comments are unable to cite to even one case in support of that proposition. Some commenters misstate the effect of the Tucker Act and even try to use the Anti-Deficiency Act as an obstacle to achieving nondiscriminatory MTE access.[113] Even a modest understanding of the two statutes reveals that neither the Tucker Act nor the Anti-Deficiency Act preclude Commission action in this docket. In its comments, Teligent explained how the *Bell Atlantic* case, and its application of the Tucker Act, is inapplicable to the nondiscriminatory MTE access context.[114]

The Anti-Deficiency Act is even more far afield. The Anti-Deficiency Act was designed to prevent federal agency assumptions of liability -- such as indemnification agreements -- without an appropriation by Congress.[115] The Anti-Deficiency Act clearly does not equate the federal government's express assumption of contractual liability with the risk that an agency's action will be judicially determined a taking. Indeed, nothing in the cases cited by commenters suggests that anything beyond an express federal government agency indemnification agreement would be prohibited by the Anti-Deficiency Act.

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112 See Comments of Real Access Alliance at 40-41.

113 See id.

114 Teligent comments at 65-75.

115 31 U.S.C. § 1341.

VI. ENFORCEMENT OF NONDISCRIMINATORY MTE ACCESS REQUIREMENTS WILL NOT SUBSTANTIALLY BURDEN THE COMMISSION'S RESOURCES.

Some commenters contend that a nondiscriminatory MTE access requirement will result in an unreasonable burden on the Commission's enforcement resources.[116] As Teligent explained in its comments, there is nothing to suggest that the need for Commission enforcement will be anything but rare. In the five years since the first State nondiscriminatory MTE access statute was enacted, Teligent, after exhaustive research, is not aware of any disputes brought formally before the public utility commissions in those States with nondiscriminatory access requirements. This is not surprising given that protracted litigation of disputes disserves the ultimate goals of all parties. Nevertheless, the *threat* of regulatory intervention serves as an incentive to resolve most disputes through negotiation.

The Commission's pole attachment complaint procedures offer yet another analogy. As the Commission stated last year

> [f]rom 1979, when the first pole attachment complaint was filed with the Commission, to 1991, approximately 246 pole attachment complaints were filed. From 1991 through 1996, approximately 44 such complaints were filed. Currently [as of February 6, 1998], there are seven pole attachment complaints under review by the Commission's Cable Services Bureau. We view this number of complaints to the Commission, in light of the penetration of cable service in the nation's communities, to be indicative that most pole attachment rates are negotiated without resort to the Commission.[117]

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116 See Comments of USTA at 16; Economic Analysis attached to Real Access Alliance Comments at 22; Constitutional Analysis attached to Real Access Alliance Comments at 38.

117 Implementation of Section 703(e) of the Telecommunications Act of 1996; Amendment of the Commission's Rules and Policies Governing Pole Attachments, CS Docket No. 97-151, *Report and Order*, 13 FCC Rcd 6777 at ¶ 10, n.37 (1998).

Currently, there are only nine pole attachment complaints pending at the Commission, notwithstanding the substantial expansion of the scope of Section 224 through the 1996 Act and the Commission's expedited complaint procedures. Teligent submits that negotiations are successful largely because the Commission has framed the general rules of negotiation and because all parties know that regulatory intervention can result from unreasonable demands or behavior.

Indeed, almost any provision of the Communications Act or almost any section of the Commission's rules could be construed in an alarmist manner to portend a flood of complaints sufficiently substantial to drain the Commission's resources. These disasters tend not to happen, though. Generally speaking, parties prefer the speed of voluntary negotiations -- as imperfect as the end product may be -- to litigated resolution. The nondiscriminatory MTE access scenario is no different.

VII. THE COMMISSION SHOULD REQUIRE RELOCATION OF THE DEMARCATION POINT IN ALL MTES UPON REQUEST.

The demarcation point should be relocated at the minimum point of entry ("MPOE") in all MTEs. No party has demonstrated the infeasibility of this approach nor can they explain why such an approach would not promote competition. In fact, even some ILECs support relocation of the demarcation point at the MPOE.[118] Given the record evidence of the technical feasibility of locating the demarcation point at the MPOE, the Commission should implement such a requirement for *all* MTEs, regardless of the date of wiring installation, upon MTE owner, customer, or telecommunications carrier request.

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[118] See, e.g., GTE Comments at 7.

A uniform demarcation point will lessen confusion surrounding deployment of competitive networks. Commenters have demonstrated that the Commission's rules, adopted in a single provider environment, can be very confusing in a competitive telecommunications market. The sometimes variant State rules add to this confusion. The demarcation point rules should facilitate competitive provision of telecommunications rather than increasing the difficulty of providing competitive facilities-based telecommunications service to consumers in MTEs. The Commission should revise its rules to accomplish this goal.

The Commission's decision in the UNE Remand proceeding[119] to make certain ILEC intra-MTE facilities available to competitors on an unbundled basis will facilitate the provision of service to consumers in MTEs and will eliminate the wasteful requirement that otherwise facilities-based CLECs lease entire loops in order to utilize only the intra-MTE portion of the ILEC facilities.[120] The Commission should take the opportunity in this very important proceeding to clarify that CLEC access to intra-MTE ILEC UNEs should be made available quickly and reasonably. Moreover, the Commission should prohibit ILECs from requiring the presence of ILEC technicians when telecommunications carriers connect their facilities with the intra-MTE facilities of the ILEC, given the technical expertise of CLEC technicians to disconnect and

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119 See *UNE Remand Public Notice*.

120 The availability of intra-MTE facilities and the Section 224 access to intra-MTE conduits and rights-of-way are not duplicate means of entering a building. In some circumstances, only one option may offer the appropriate course. For example, where pre-existing intra-MTE wiring is inadequate to satisfy the CLEC service quality standards, the CLEC can use Section 224 to string its own cabling through the conduit and rights-of-way within the MTE. By contrast, where legitimate and demonstrable space constraints within the MTE preclude the installation of a CLEC's facilities, or where it is otherwise unnecessary to duplicate the ILEC's wire, the CLEC may still serve a consumer within the MTE by leasing the intra-MTE wiring from the ILEC on an unbundled basis.

reconnect the wire themselves. In practice, the presence of ILEC technicians often is not required for such purposes. The Commission should confirm that no ILEC may, as a matter of course, require the presence of its technicians for CLEC connection with intra-MTE facilities. Any other approach would result in serious delay and substantial and unnecessary expense for the competing carrier and the customer.

However, Teligent consistently has explained that unbundling intra-MTE facilities is a second-best alternative -- not a replacement for -- relocation of the demarcation point to the MPOE. By relocating the demarcation point to the MPOE, facilities-based carriers can serve consumers in MTEs without reliance on the ILEC, which presents yet another layer of cost and delay to serving consumers in MTEs. By relocating the demarcation point to the MPOE, the CLEC can obtain MTE access pursuant to negotiations with the MTE owner only, thereby facilitating entry by facilities-based carriers (if, of course, MTE owners are required to comply with nondiscriminatory access obligations).